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Supreme Court, U.S.
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**In The**

Supreme Court of the United States

**October Term, 2000**

*DERRICK CAIN,*

*Petitioner,*

v.

*STATE OF MICHIGAN,*

*Respondent.*

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**On Petition For A Writ Of Certiorari**
**To the Michigan Court of Appeals**

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# PETITION FOR A WRIT OF CERTIORARI and Appendix

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59 pp

## ***QUESTIONS PRESENTED FOR REVIEW***

**IN THIS SEXUAL MISCONDUCT CASE, IS THE PETITIONER, DERRICK CAIN, ENTITLED TO A NEW TRIAL AS HIS DUE PROCESS AND CONFRONTATION RIGHTS WERE VIOLATED.**

**(1) AS THERE WAS NO EVIDENCE OF CONTEMPORANEOUS NONCONSENT;**

**(2) A CRUCIAL ELEMENT, THAT THE DEFENDANT HAVE KNOWLEDGE THAT THE SEXUAL CONDUCT WAS THE PRODUCT OF FORCE OR COERCION WAS LACKING IN THE JURY INSTRUCTIONS;**

**(3) HIS ONLY THEORY OF DEFENSE (CONSENT) WAS NOT PRESENTED TO THE JURY;**

**(4) THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT THE PROSECUTION HAD THE BURDEN OF PROOF ON THE ISSUE OF CONSENT;**

**(5) THE JURY WAS INSRUCTED THAT THE VICTIM NEED NOT RESIST IN ANY WAY;**

**(6) THE PETITIONER WAS TRIED WITH A NON-TESTIFYING CO-DEFENDANT WHOSE CONFESSION WAS ADMITTED AS SUBSTANTIVE EVIDENCE ?**

## LIST OF PARTIES

1. Derrick Cain, the Defendant/Appellant

2. State of Michigan, respondent which was the Plaintiff/Appellee in the proceedings below.

## TABLE OF CONTENTS

Page

Question Presented for Review ..... i
List of Parties ..... ii
Table of Contents ..... iii
Index of Authorities ..... iv
Petition For Writ of Certiorari ..... 1
Opinions Below ..... 1
Jurisdiction ..... 2
Constitutional Provisions ..... 2
Statement of the Case ..... 3
Reasons for Granting the Writ ..... 13
Relief Requested ..... 30

Appendix:
Appendix A ..... 1a
Appendix B ..... 22a

## INDEX OF AUTHORITIES

**CASES:**

*Bonker v. People*, 37 Mich 4 (1877) ..... 24

*Bruton v. U.S.*, 391 US, 123, 88 S.Ct 1620, 20 L. Ed 2d 476 (1968) ..... 27, 28

*City of Lansing v. Hartsuff*, 213 Mich.App 338, 539 NW2d 781 (1995) ..... 29

*Flaxer* v. *United States*, 358 U.S. 147, 151 ..... 15

*Jordan* v. *De George*, 341 U.S. 223, 230 ..... 15

*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 ..... 15

*McKine v. Hammer*, 387 Mich 82, 194 NW2d 841 (1972) ..... 24

*Mills v. United States*, 164 U.S. 644, 669-71; 17 S. Ct. 210, 41 L Ed. 584 (1897) ..... 14

*Missouri v. Gray*, 497 SW2d (1973) ..... 21

*New Hampshire v. Goodwin*, 140 NH 672, 671 A2d 554 (1996) ..... 24

*People v. Berlin*, 202 Mich App 221, 507 NW2d 507 (1993) ..... 17

*People v. Bowen*, 10 Mich App 1, 158 NW2d 794 (1968) ..... 18

*People v. Brown*, 197 Mich App 448, 495 NW2d 812, 813 (1992) .22

*People v. Butler*, 413 Mich 377, 319 NW2d 540 (1982) ..... 18

*People v. Gordon*, 99 Mich.App 142 (1980) ..... 29

*People v. Griffen*, 77 Mich 585, 43 NW 1061 (1899) ..... 24

*People v. Guillett*, 342 Mich 1 (1955) ..... 18

*People v Hepne*, 285 Mich 631, 281 NW 384 (1938) ..... 27

*People v Jackson*, 158 Mich App. 544, 405 NW 2d 192 (1987) ..... 27

*People v. Jeff*, 251 Call Rptr 135, 204 CA3d 309 (1988) ..... 24

*People v. Kelley*, 78 Mich App 769, 260 NW2d 923 (1977) ..... 17

*People v. Langworthy*, 416 Mich 630, 331 NW2d 171, 174 (1982) ..... 22

*People v. Logie*, 321 Mich. 303, 32 NW2d 458 (1948) .....29
*People v Louzon*, 338 Mich 146, 61 NW2d 52 (1953).....27
*People v Moore*, 176 Mich.App 555 (1989) .....29
*People v. McDonald*, 5 Mich 149 (1861) .....19
*People v. McGill*, 131 Mich App 465, 346 NW2d 572, 577 (1984).....20
*People v. Petrella*, 424 Mich. 221, 277 (1985) .....29
*People v. Smith*, 185 Ill Dec 641, 614 NE2d 1326 (1993).....24
*People v. Watkins*, 438 Mich 627, 475 NW2d 727 (1991).....27
*Scull v. Virginia ex rel Committee On Law Reform and Racial Activities*, 359 U.S. 344,345-346; 79 S. Ct. 838; 3 L. Ed. 2d 865 (1959).....15
*Souvais v. Leavitt*, 50 Mich 108, 15 NW 37 (1883) .....24
*U.S. v Cobleigh*, 75 F. 3d 242 (6th Cir. 1996).....28
*Watkins* v. *United States*, 354 U.S. 178, 208-209, 214-215, 217 ....15
*Winters* v. *New York*, 333 U.S. 507 .....15

**CONSTITUTIONAL PROVISIONS**

AMENDMENT VI

AMENDMENT XIV § 1

**OTHER AUTHORITIES**

Model Penal Code Section 213.4 (American Law Institute 1962)

MCLA Sec 750.520b

## PETITION FOR WRIT OF CERTIORI

Petitioner Derrick Cain respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals that was entered on August 13, 1999. The Michigan Supreme Court denied further and final review on August 22, 2000. It is contended that the Petitioner was denied his constitutional rights to due process and confrontation, in his trial that resulted in a criminal sexual misconduct conviction. Review is requested to challenge this miscarriage of justice.

## OPINIONS BELOW

The Order denying the Application for leave to Appeal by the Michigan Supreme Court, the highest Court in the State of Michigan, which denied further Appeal from the Michigan Court of Appeals is reprinted in the Appendix. It is from that Order, dated November 22, 2000, that this Petition arises. The Opinion of the Michigan Court of Appeals that was appealed to the Michigan Supreme Court is also contained in the Appendix. The Order of the Michigan Supreme Court and the Opinions below were not published.

## STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a) based on an appeal by right of a final Order of the Michigan Supreme Court that was entered on August 23, 2000. Jurisdiction of this Court is based on the existence of a substantial federal question, namely, the Sixth (confrontation clause) and Fourteenth Amendments of the Constitution of the United States. The Michigan Court of Appeals ignored and misinterpreted rulings of this Court in upholding the Petitioner's conviction.

## CONSTITUTIONAL PROVISIONS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the Stated and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense. AMENDMENT VI.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. AMENDMENT XIV § 1.

## STATEMENT OF THE CASE

The date of the alleged crime was September 13, 1996. (Vol. II, p. 39) For approximately one (1) year previous to this date, the Complainant, Latasha Boles, baby-sat for Yvette Wright. (Vol. II, p. 40) Ms. Wright is the mother of the Petitioner, Derrick Cain's son. The Complainant, would spend the night at Yvette Wright's house, or come over at 6:00 a.m. (Vol. II, p. 41) She went over to Yvette Wright's house between 8:00 and 9:30 p.m. on Thursday night, September 12, 1996. (Vol. II, p. 43; Vol. III, pp. 43, 46) Later that same evening, the Petitioner, Derrick Cain and the Co-Defendant, Ramone Jones, came to Ms. Wright's home. (Vol. II, pp. 44-45) Latasha Boles testified that Mr. Cain introduced Mr. Jones as "Psycho." (Vol. II, p. 45)

Ms. Boles testified that in the course of the conversation, Co-Defendant, Jones, then bent over and kissed her on the neck twice. (Vol. II, p. 55; Vol. III, p. 61) Ms. Boles testified she told Mr. Jones to stop, got up and left the kitchen. (Vol. II, p. 55) She then laid on the floor in the front room. (Vol. II, pp. 55-56) At this time, Yvette Wright was on one couch and two of her children were on the only other couch in the front room. (Vol. II, p. 56) Derrick Cain lay on the couch with Yvette. (Vol. III, p. 65) Ms. Boles testified there was nowhere else for her to lie other than on the floor. (Vol. II, p. 56) Mr. Jones then came in and lay down on the floor behind her. (Vol. II, p. 56; Vol. III, p. 65) Mr. Jones then wrapped his arm around her. (Vol. III, p. 66) When Mr. Jones lay down next to her, she rolled over closer to the couch. (Vol. II, p. 57; Vol. III, p. 66) Mr. Jones then reached over and grabbed her hand. (Vol. II, p. 57; Vol. III, pp. 67, 68) She thinks he may have moved closer to her at this time. (Vol. II, p. 57) Ms. Boles testified that she told Mr. Jones to stop loud enough for Mr. Cain and Ms. Wright to hear it. (Vol. III, p. 67) Mr. Cain denied ever hearing Ms. Boles tell Mr. Jones to stop. (Vol. V, p. 25) Ms. Wright also said she did hear Ms. Boles say this. (Vol. IV, pp. 109-110)

At this time, Ms. Boles testified that she then got up and went into the bedroom where Ms. Wright's two (2) other children were. (Vol. II, p. 58; Vol. III, p. 68) The children were lying on the bed and she lay on a couch, which was the only other piece of furniture in the bedroom. (Vol. II, p. 58) The children were sleeping at this time. (Vol. II, p. 59) Although the bedroom door had a lock, Ms. Boles did not lock it, after she entered. (Vol. III, p. 70) She was wearing blue jeans, a sweatshirt, gym shoes and underwear. (Vol. II, p. 58) While she was lying on the bedroom couch, Mr. Jones came into the bedroom and lay on top of her. (Vol. II, p. 60) At this time, Mr. Cain continued to remain in the living room.

Once in the bedroom, Mr. Jones started kissing her. (Vol. II, p. 60) Ms. Boles testified that she made no noise but started crying. (Vol. II, p. 60; Vol. III, pp. 78-79) She did not complain to Ms. Wright. (Vol. III, p. 70) She asked him to stop but Mr. Jones continued kissing her. (Vol. II, p. 61; Vol. III, pp. 72, 73) Mr. Jones then put his hand under her shirt while he was kissing her. (Vol. II, p. 61) According to Ms. Boles, Mr. Jones told her to quit crying or he "would get ignorant." (Vol. III, p. 73) Mr. Jones then attempted to pull her pants down but Ms. Boles clenched her legs. (Vol. II, p. 61) Other than saying stop, she did nothing else to stop Mr. Jones. (Vol. II, p. 61) Nothing was covering her mouth. (Vol. III, p. 79) She could have banged the wall adjacent to the couch but did not. (Vol. III, p. 79) She testified that she did not put up a fight because Mr. Jones was stronger than she was. (Vol. II, p. 61)

According to Ms. Boles, Mr. Jones made her unclench her legs by giving her a "look." (Vol. II, p. 62; Vol. III, p. 75) Mr. Jones then pulled her jeans and underwear down to her ankles. (Vol. II, p. 62) He stuck his head between her legs. (Vol. II, p. 62) He then had oral sex with her. (Vol. II, p. 63) She does not know whether the kissing was inside or outside of the vagina. (Vol. II, pp. 63-64) Ms. Boles testified that she cried while she was lying there. (Vol. II, p. 64) Mr. Jones then had vaginal intercourse with her. (Vol. II, p. 64) According to Ms. Boles, while she and Jones were having

intercourse, Mr. Cain came in laughing and talking loud. (Vol. II, p. 65) She did not remember what he was saying. (Vol. II, p. 65)

However, she interpreted Mr. Cain's statement as an approval of what Mr. Jones was doing. (Vol. II, pp. 65, 67) In her Statement to the Detroit Police Sex Crime Unit, Ms. Boles had simply indicated that Derrick Cain had been watching. (Vol. III, p. 81) Ms. Boles conceded she never said anything to Mr. Cain to let him know that she was not having consensual sex with Mr. Jones. (Vol. III, p. 80) While Ms. Boles and Mr. Jones were having intercourse, the children woke up. (Vol. II, p. 67) Mr. Cain then escorted the children from the room. (Vol. II, p. 67) After sexual intercourse, Mr. Jones and Ms. Boles got out of bed and put their clothes on. (Vol. II, p. 68; Vol. III, p. 83) She sat on the couch. (Vol. II, p. 68) Mr. Jones remained in the room with her. (Vol. II, p. 68)

Ms. Boles next testified that Mr. Cain then entered the room. (Vol. II, p. 68) According to Ms. Boles, Mr. Cain said that he was not as nice as Mr. Jones and told her to take her clothes off. (Vol. II, p. 69; Vol. III, p. 84) She took her clothes off. (Vol. II, p. 69) Nobody, including Mr. Cain, participated in her undressing. (Vol. II, p. 69) Ms. Boles testified she removed her clothes because she was scared. (Vol. II, p. 69) However, according to her, there was no threat with a knife or otherwise. (Vol. III, p. 84) Ms. Boles conceded that the incident was vague and she did not remember a lot of things. (Vol. III, p. 77)

While Mr. Jones remained in the room at this time (Vol. II, p. 69), Mr. Cain then told her to get on her knees. (Vol. II, p. 70) Mr. Cain pulled his pants down to his thighs. (Vol. II, p. 70) She said she was "made" to put her mouth on his penis. (Vol. II, p. 70) There was no testimony of any force or threat of force. (Id.) Ms. Boles testified she did this because she was scared. (Vol. II, p. 71) After the sex act was completed, Mr. Cain got up, pulled his clothes up and left the room.

Afterwards, Mr. Jones called her over to the bed and began to have sex with her again. (Vol. II, pp. 71-72, 73) Ms. Boles said she had intercourse with Mr. Jones because she was scared. (Vol. II, p. 72) After intercourse, Ms. Boles testified that Mr. Jones made her get up and wash. (Vol. II, p. 72) She then got fully dressed and saw Yvette Wright in the hallway. (Vol. II, p. 73) It was about dawn. (Vol. II, p. 73) She testified Yvette asked her what was wrong and Mr. Cain responded that nothing was wrong. (Vol. II, p. 74) Ms. Boles then went into the bathroom. (Vol. II, p. 75) After approximately five (5) minutes in the bathroom, Mr. Jones came in as she was turning the water on. (Vol. II, p. 76) Mr. Jones then started to have sex with her again. (Vol. II, p. 76) He just told her to come here. (Vol. II, p. 77) He then had intercourse with her again. (Vol. II, p. 77) Mr. Jones pulled her pants to her knees. (Vol. II, p. 77) She said she again had intercourse because she was scared. (Vol. II, p. 78) There was no struggle. (Vol. II, p. 78)

According to Ms. Boles, Mr. Cain then came into the bathroom and told her that if she wanted them to let her go she had to have oral sex with him one more time and it would be over with. (Vol. II, pp. 79-80), On the second day of her testimony, after a recess, Ms. Boles amplified her testimony and stated that Mr. Cain told her that she "better suck his "dick" and told her that she "wasn't sucking it right . . . " (Vol. III, p 24) He then touched her on her shoulder and pulled her down to her knees. (Vol. II, p. 80) According to her, he then stuck his penis in her mouth. (Vol. II, p. 80) During this episode, she testified that Mr. Jones or Mr. Cain would always be in a room with her. (Vol. II, p. 81) Although there was no evidence of any overt attempt to keep Ms. Boles inside the house, Ms. Boles testified that she received some non-verbal, unspecified body language signals that she could not leave Yvette Wright's home. (Vol. III, pp. 178-180. However, she was not told verbally that nobody was leaving the house. (Vol. III, p. 178) Ms. Boles testified that she kind of felt that she would be held in the house because Mr. Cain did not want her to talk of an argument that he had with Yvette Wright. (Vol. III, pp. 182-183)

According to Ms. Boles, while in Yvette's bedroom, Mr. Cain made a gesture with his hand where he put his index finger to the right side of his neck and moved it across to the left side of his neck. (Vol. II, p. 81) He did this while he was whispering to Mr. Jones. (Vol. II, p. 81) Ms. Boles testified that she interpreted this as a threatening gesture. (Vol. III, p. 88) Mr. Cain denied making this gesture. Early in her second day on the stand, Ms. Boles amplified her testimony and stated that she interpreted Derrick Cain's motion as a threat to slit her throat. (Vol. III, p. 4) She didn't recall how many times he made that gesture that night. (Vol. III, p. 4) Ms. Boles denied telling the police that Mr. Cain threatened to slit her throat. (Vol. III, pp. 88, 90) However, she had earlier reported and signed a statement to a police officer that this had occurred. (Vol. III, pp. 90-91)

She testified that Mr. Cain had earlier that evening walked around the house with a knife in his hand. (Vol. III, p. 5) She had seen him with a knife in the kitchen and the living room. (Vol. III, p. 5) (Vol. III, pp. 88, 90) While in the kitchen, Ms. Boles testified Derrick Cain had "carved" a design in his chest with a knife although there was no bleeding. (Vol. III, p. 63) She stated she observed him carving an arrow design on his chest. (Vol. III, p. 63) Ms. Boles did not remember any threat with the knife. (Vol. III, pp. 63-64) The knife was never pointed at Ms. Boles. (Vol. III, p. 64) There was never a demand that if sex were not given she would be cut up with the knife. (Vol. III, p. 64) Although she testified at trial that Mr. Cain had a knife in the bedroom, she had denied this in her testimony at the Preliminary Examination of Co-Defendant, Ramone Jones. (Vol. III, p. 102).

Latasha Boles testified that the next morning, when Yvette Wright returned to her house, Mr. Cain walked to her side and told her to go into the kids' room. (Vol. III, p. 8) She went into the room and lay down. (Vol. III, pp. 8-9) This was a different bedroom than the one referred to before. (Vol. III, p. 9) Mr. Cain told her to lie on the bed and go to sleep and he lay on the floor and Mr. Jones lay on

the couch. (Vol. III, p. 10) Yvette then went to work. (Vol. III, p. 10) Ms. Boles' aunt then came to the house to drop Ms. Boles' cousin off. (Vol. III, p. 11) Ms. Boles' cousin then went to school with Yvette's children. (Vol. III, p. 12)

Later that morning, Ms. Boles left the room and went into the front room. (Vol. III, p. 13) Mr. Cain then cooked his son something to eat and Mr. Jones apologized about what happened. (Vol. III, p. 13) She testified that Mr. Jones said that he was sorry and he knew he was wrong for what he did. (Vol. III, p. 14) Ms. Boles testified she knew Mr. Jones was talking about raping her. (Vol. III, p. 14) Mr. Jones never testified in this case so this testimony was never rebutted.

The Petitioner, Derrick Cain, a Navy veteran, testified on his own behalf. Mr. Cain testified that after returning from the store, Ms. Boles was sitting on Mr. Jones' lap. (Vol. IV, p. 187) Mr. Cain asked if they wanted some privacy and Mr. Jones replied no. (Vol. IV, p. 187) Later, when Mr. Jones and Ms. Boles started kissing each other, Mr. Cain left the kitchen. (Vol. IV, p. 187) He went back to the living room with Yvette. (Vol. IV, p. 187)

Shortly thereafter, Ms. Boles and Mr. Jones came into the living room and lay down on the floor. (Vol. IV, p. 188) About five (5) minutes later, Latasha Boles got up and went into Yvette's room. (Vol. IV, p. 188) As they were walking into the bedroom, Mr. Cain heard sounds of laughing and giggling and playing around. (Vol. IV, p. 188)

Later, Mr. Cain awoke for no particular reason. (Vol. IV, p. 189) He then looked into the bedroom and observed Ms. Boles and Mr. Jones were having sexual intercourse. (Vol. IV, p. 189) He awoke Yvette Wright and she told him to get the children out of the room. (Vol. IV, p. 189) Mr. Cain then brought the children out of the bedroom being used by Ms. Boles and Mr. Jones. (Vol. IV, pp.

189-190) Later, Mr. Cain again peeked into the room. (Vol. IV, p. 191)

Mr. Cain testified that the next morning after Yvette Wright left for work, he asked Ms. Boles for oral sex and she willingly engaged in it. (Vol. IV, pp. 191-192) During the course of the evening, he never threatened Ms. Boles. (Vol. IV, p. 192) He never used any physical violence. (Vol. IV, pp. 192-193) He never threatened to retaliate against her or her family if she did not have sex with him. (Vol. IV, p. 193) Mr. Cain never prevented Ms. Boles from talking with Ms. Wright. (Vol. IV, p. 193) Mr. Cain denied he cut off communication between the two of them. (Vol. IV, p. 194) When he drove Ms. Boles to school to pick up her younger cousin. (Vol. IV, p. 196) Her cousin was waiting in line across the street. (Vol. IV, p. 197) Mr. Cain testified he allowed Ms. Boles to walk across the street to pick her up. (Vol. V, p. 45)

After returning Ms. Boles to Yvette Wright's house, Mr. Cain and Mr. Jones departed at approximately 12:15 p.m. (Vol. IV, p. 198) Mr. Cain had an appointment to donate blood in Oak Park, Michigan at the Bio Medical Center. (Vol. IV, p. 198) Contrary to the testimony of Ms. Boles, he was donating blood when she claimed that he was holding her against her will at Yvette Wright's house. (Vol. IV, pp. 199-200) Contrary to the testimony of Ms. Boles, Mr. Cain never carved an arrow into his chest with a knife that evening. (Vol. IV, pp. 200-201) The arrow tattoo had been on his chest since 1995. (Vol. IV, p. 201) Mr. Cain never took a knife into the bedroom. (Vol. IV, p. 201) He never heard Ms. Boles say stop it to Mr. Jones. (Vol. IV, p. 201) He also denied making a sweeping motion across his neck with his hand. (Vol. IV, p. 202) The next day, Saturday, Mr. Cain returned to Yvette's house to pick up his son. (Vol. IV, p. 203) He then went and asked a neighbor about Yvette when no one came to the door. (Vol. IV, p. 204)

As can be seen, although there was some discrepancy in the testimony, the principal distinction may be one of perception.

Although Ms. Boles testified that she had sex because she was scared, she did not testify that she told Mr. Cain she did not want to have sex. Nor was there any evidence of any threat being made or physical force being used, by Mr. Cain. Consequently, the question of consent was central to the case.

Undoubtedly, the **only** theory of both Petitioner and his Co-Defendant in this case was that the sex was consensual. This was the unequivocal testimony of the Petitioner, Derrick Cain (Vol. IV, pp. 191-192), and the only argument made by Counsel for the Petitioner at trial. Although the case was tried on the issue of consent, this issue **was never submitted** to the jury. However, there was more than ample evidence justifying submission of this issue to the jury.

The fact that behind closed doors the Co-Defendant may have used force against the Complainant cannot be inferred against Petitioner, Derrick Cain. The testimony is unrebutted that the complainant never told Mr. Cain that she was not consenting to sex with Ramone Jones. (Vol. III, p. 80) According to her testimony, she never asked Derrick Cain to leave her alone. (Vol. III, p. 176) She indicated that Mr. Cain had no knife when he entered the bedroom. (Vol. III, p. 84) Also, she conceded he did not threaten her with the knife. (Vol. 111, p. 84) She testified that Mr. Cain sat on the couch and stated that he was not as nice as Mr. Jones and told her to get undressed. (Vol. III, p. 84) Ms. Boles initially testified that she interpreted Mr. Cain's statement as a request. (Vol. IV, p. 45) Furthermore, although Ms. Boles, the complainant, testified at trial that Mr. Cain had a knife in the bedroom, she had previously denied this under oath. (Vol. 111, p. 102) Ms. Boles also testified that she could have banged the wall adjacent to the couch but did not. (Vol. 111, p. 79) Nor did she show any other manifestation of resistance. (Vol. 11, p. 61) Amazingly, Ms. Boles also averred that she made some of her answers up! (Vol. III, p. 157)

Since there was no issue submitted to the jury, pursuant to any jury instruction, the Defendant's testimony and the arguments of

Counsel were rendered irrelevant. Moreover, there was no instruction that the prosecution bears the burden of proving the Defendant's guilt beyond a reasonable doubt as to the affirmative defense of consent. By ruling that there was no need to instruct the jury on the Defendant's only theory of defense, the Michigan Court of Appeals undermined the whole theory of jury Instructions. **How or why would the jury necessarily infer that consent would be a defense when they were not told this?**

**Furthermore, the Michigan Court of Appeals incorrectly relied on an alleged threat with a knife in support of its conclusion of force. However, Ms. Boles did not remember any threat with the knife. (Vol. 111, pp. 63-64) The knife was never pointed at Ms. Boles. (Vol. 111, p. 64) There was never a demand that if sex were not given she would be cut up with the knife. (Vol. 111, p. 64) Although she testified at trial that Mr. Cain had a knife in the bedroom, she had earlier denied this in her testimony at the Preliminary Examination of Co-Defendant, Ramone Jones. (Vol. 111, p. 102)**

There can be no doubt but that the defense of consent was the central issue in this case. The arguments of counsel and the testimony of the Defendant were all shaped around this defense. Consequently, the trial court was required to inform the jury of the Defendant's theory of defense --- even in the absence of a request to instruct:

Moreover, there is no evidence in this case that Derrick Cain knew, or should have known, that the alleged victim, Latasha Boles, did not voluntarily participate in her sexual encounter with Derrick Cain. In this regard, the following testimony of Latasha Boles, pertaining to her contact with Derrick Cain, was most cogent:

**"Q. My question is, you were frightened of him but you never asked him to leave you alone?**

**A. No, I did not.**

**Q. You never told him no?**

**A. No, I did not."**

(Vol. III, p. 176)

Nor was there evidence of any forced pushing, shoving, pulling or tugging. Nor was there any evidence of any weapon being used to coerce the sexual act. The only evidence was that earlier in a conversation with Yvette Wright, the Defendant Cain had a knife in his hand and handed it to Yvette Wright with the request that if she did not want him in her life that she could stab him. The mere presence of a knife in the house would not establish the requisite elements of force as there is and insufficient nexus between the weapon and the alleged act. In other words, there must be some causation involved. Otherwise, a police officer, who is duty bound to have a gun nearby on a 24-hour basis, would be guilty per se.

The complainant conceded that she knew that Mr. Jones was flirting with her. (Vol. III, p. 160) Amazingly, Ms. Boles testified that she made some of her answers up. (Vol. III, p. 157) **Nor can the alleged fear that Latasha Boles had of the Defendant Cain be used. The fact that Derrick Cain may have been argumentative with his former girlfriend, Yvette Wright, on previous occasions, cannot supply the necessary nexus between force and the act.**

Following the testimony and instructions, the jury returned a verdict against both Defendants as to both counts of criminal sexual conduct third degree. (Vol. V, pp. 160-161) A timely Motion for New Trial was filed. The Trial Court adjourned a ruling on the Motion until the completion of the trial transcripts. (See transcript Aug. 15, 1997) The Trial Court then denied the Defendant's Motion for a New Trial. (See transcript March 26, 1999). The Appeal Brief to the Court of Appeals included issues that had been brought to the Lower Court in the Defendant's Motion for New Trial.

The Court of Appeals, in an unpublished Opinion, affirmed the Trial Court in every respect. Most of the arguments of the Defendant/ Appellant were deemed to have been waived and not to have been made in the Lower Court. Nevertheless, the Court of Appeals also ruled that the Defendant/Appellant was not denied his right to the effective assistance of Counsel. The Court of Appeals later denied the Defendant's timely filed Motion for Rehearing and Reconsideration in an Order dated October 29, 1999. From the unpublished Opinion of the Court of Appeals, an Application for Leave to Appeal was filed with the Michigan Supreme Court. It is from that denial that this Writ is filed.

## REASONS FOR GRANTING THE WRIT

### *ARGUMENT*

**IN THIS SEXUAL MISCONDUCT CASE, IS THE PETITIONER, DERRICK CAIN, ENTITLED TO A NEW TRIAL AS HIS DUE PROCESS AND CONFRONTATION RIGHTS WERE VIOLATED (1) AS THERE WAS NO EVIDENCE OF CONTEMPORANEOUS NONCONSENT; (2) A CRUCIAL ELEMENT, THAT THE DEFENDANT HAVE KNOWLEDGE THAT THE SEXUAL CONDUCT WAS THE PRODUCT OF FORCE OR COERCION WAS LACKING IN THE JURY INSTRUCTIONS; (2) HIS ONLY THEORY OF DEFENSE (CONSENT) WAS NOT PRESENTED TO THE JURY; (3) THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT THE PROSECUTION HAD THE BURDEN OF PROOF ON THE ISSUE OF CONSENT; (4) THE JURY WAS INSRUCTED THAT THE VICTIM NEED NOT RESIST IN ANY WAY; (5) THE PETITIONER WAS TRIED WITH A NON-TESTIFYINGCO-DEFENDANT WHOSE COFESSION WAS ADMITTED AS SUBSTANTIVE EVIDENCE ?**

In a criminal sexual misconduct prosecution, concerning an alleged adult and competent victim, it is a denial of due process to convict without the prosecution being required to prove that the alleged victim made some objective demonstration of opposition to the sexual encounter. Relying on the common law, this Court in *Mills v. United States*, 164 U.S. 644,669-71; 17 S. Ct. 210, 41 L Ed. 584 (1897) directly addressed the central issue involved in this Case:

> *With evidence such as has been outlined, the court in charging the jury said: "The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of the crime." An exception was taken to the definition of the crime as given by the court.*
>
> *In this charge we think the court did not explain fully enough so as to be understood by the jury what constitutes in law non-consent on the part of the woman, and what is the force, necessary in all cases of non-consent, to constitute this crime. He merely stated that if the woman did not give consent the only force necessary to constitute the crime in that*
>
> *case was that which was incident to the commission of the act itself. That is true in a case where the woman's will or her resistance had been overcome by threats or fright, or she had become helpless or unconscious, so that while not consenting she still did not resist. But the charge in question covered much more extensive ground. It covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply non-consent on her part and no real resistance whatever. Such non-consent as that is no more than a mere lack of acquiescence, and is not enough to*

*constitute the crime of rape. Taking all the evidence in the case, the jury might have inferred just that amount of non-consent in this case. Not that they were bound to do so, but the question was one for them to decide. The mere non-consent of a female to intercourse where she is in possession of her natural, mental and physical powers, is not overcome by numbers or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances. More force is necessary when that is the character of non-consent than was stated by the court to be necessary to make out that element of the crime. That kind of nonconsent is not enough, nor is the force spoken of then sufficient, which is only incidental to the act itself.*

This Court has often held that fundamental fairness requires that reasonable certainty exist to determine that a crime has been committed: In *Scull v. Virginia ex rel Committee On Law Reform and Racial Activities*, 359 U.S. 344,345-346; 79 S. Ct. 838; 3 L. Ed. 2d 865 (1959), this Court ruled that "[t]o sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Jordan* v. *De George*, 341 U.S. 223, 230; *Watkins* v. *United States*, 354 U.S. 178, 208-209, 214-215, 217; *Flaxer* v. *United States*, 358 U.S. 147, 151. Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law. *Winters* v. *New York*, 333 U.S. 507. Such is plainly the case here. The information given to Scull was far too wavering, confused and cloudy to sustain his conviction."

The criminal Sexual conduct statute, pursuant to which the Petitioner was convicted, provides as follows:

"(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years."

*MCLA § 750.520d*

The relevant circumstances enumerated in the statute referred to are:

> "(i) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats."
>
> *MCLA Sec 750.520b(f)(i)(ii)*

In this case, there is simply no evidence of force or coercion contemporaneous or connected to the alleged sexual penetration caused by the Defendant. In the context of this case, there are two (2) possibly relevant statutory definitions of force or coercion. [I] Force or coercion requires that the victim be overcome through the actual application of physical force or physical violence. (MCLA

Sec 750.520b) or [II] if the victim is coerced to submit by the Defendant's threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

There is simply no evidence that Derrick Cain physically forced Latasha Boles to engage in fellatio. There is no evidence that he hit, pulled, choked, pushed or otherwise forced the complainant. A suggestion of sexual conduct does not supply the requisite force and coercion to constitute criminal sexual conduct. See e.g., People v. Berlin, 202 Mich App 221, 507 NW2d 507 (1993) Nevertheless, at the close of the case, the jury was instructed as follows concerning the fact that the complainant need not resist:

> "It is not necessary to prove any of these charges that there be evidence other than the testimony of the complainant. That is, if that testimony proves guilt beyond a reasonable doubt. Also to prove these charges the **prosecutor does not have to show that the complainant resisted the defendants.**"

(Vol. V, p. 153)

The generally accepted definition of "resist" is "to oppose." See e.g., New Webster's Dictionary, Lexicon Publications (1993). Obviously, the common definition of resistance does not necessarily contemplate the use of **physical force** or violence. An example of this usage would be: "The majority party resisted every effort to compromise." Black's Law Dictionary (4th Ed. 1968) contains the same definition: to oppose. Not surprisingly, the case law concerning the charge of resisting arrest indicates that a crime is established even **without** actual physical force or violence. See e.g., People v. Kelley, 78 Mich App 769, 260 NW2d 923 (1977).

Undoubtedly, the instruction given by the Trial Court goes too far. Although a fight or physical resistance is certainly not necessary, it is respectfully submitted that the complainant in a rape

case - if she is physically able -- **oppose the act** -- at least verbally. The testimony is clear that the complainant, Latasha Boles, did not resist physically **or verbally**. That is, she did not "oppose." Nor was there any evidence that Mr. Cain used any force or threat of force against her. There must be a manifested opposition from the victim. However, this is not what the jury was instructed. If an act is not opposed there can be no rape. Under the law, sexual misconduct requires proof of intent. See e.g., People v. Guillett, 342 Mich 1 (1955). In Guillet, the Michigan Supreme Court held that intent was a necessary element, which must be instructed on, in a case involving assault with intent to commit rape.

Nor can the intent inferred to the Co-Defendant be transferred to Derrick Cain. There was testimony that the Co-Defendant, Ramone Jones, did use force during his sexual encounter. However, there was no conspiracy charged at the time of trial. Therefore, the acts and statements of Ramone Jones cannot then become the acts and statements of Derrick Cain. Guilt must be personal. See e.g., People v. Butler, 413 Mich 377, 319 NW2d 540,543 (1982):

The proofs are very consistent that the victim, Ms. Boles, may have felt that she was forced by the conduct of the Co-Defendant without Derrick Cain having any knowledge whatsoever of any force having been applied to her previously. There is no evidence that the Defendant knew that any threats were made against her. To the contrary, the evidence is that none of the threats were made in his presence. This cannot be overemphasized as Ms. Boles testified that she never indicated any negative response, either verbally or through body language, to the request for oral sex made by Derrick Cain. See e.g., People v. Bowen, 10 Mich App 1, 158 NW2d 794 (1968). Consequently, a New Trial is warranted.

Criminal sexual misconduct implies lack of consent. Lack of consent is not always an element to criminal sexual misconduct as a person may be drugged, mentally incompetent, below the age of consent or otherwise unable to render consent. However, there was

no evidence or claim that any of these factors were present in this case. The only factor relied upon by the prosecution was force and coercion. It was the Prosecuting Attorney's theory of the case that force and coercion was used to compel the complainant to submit to sexual contact. However, as to Derrick Cain, there was insufficient evidence to support this conclusion.

It is quite clear that if consent is in fact given, there can be no sexual assault if the alleged victim is otherwise competent. See e.g., People v. McDonald, 5 Mich 149 (1861). If consent was not a defense, then two (2) prizefighters could criminally prosecute each other for assault and battery.

In addition, and almost as equally axiomatic, there must be a connection between the use of force or coercion and the sexual contact. For instance, if a motorist drove over a dead body, there would be no causation and the person could not be charged with manslaughter. In the context of sexual assault, the Michigan Supreme Court has stated the following:

> "The true rule as to force in cases of rape generally, was recognized by the Court of Appeals in People v. Valentine Cornwell, 13 Mich 433, where it was said 'the essence of the crime is not the fact of intercourse, but the injury and outrage of the feelings of the woman by means of the carnal knowledge effected by force.' "
>
> Don Moran v. People, 25 Mich 355 (1872)
>
> (Emphasis added.)

Here, there is no connection between any force and any alleged sexual misconduct.

**Next, it is clear that there must be some criminal intent. That is, if the Defendant must have some awareness that he is**

**committing a crime. An example in this context would be a prostitute who was beaten by her "pimp" and as a result, performs acts of prostitution. The "John" who partakes in sexual acts with the prostitute is not himself guilty of criminal sexual misconduct unless he somehow participated or otherwise culpable with regard to the connection between the force and the sexual act. Next, under the criminal sexual misconduct statute, there must be legally sufficient force or coercion. The force and coercion must be reasonably contemporaneous.**

A case which explores the legal sufficiency of force and coercion is People v. McGill, 131 Mich App 465, 346 NW2d 572, 577 (1984). In McGill, a situation was presented where an older man brought a young babysitter to an isolated area. The Court of Appeals relied extensively on the age differential and the vulnerable position of the young girl:

> "We do not hold here that the type of actual conduct described in the instant case will always satisfy the 'force or coercion' element. Were the victim older or had the undesired touching occurred in a place from which the victim could easily leave or from which she could summon help, a fear of dangerous consequences might not be deemed reasonable and an atmosphere of coercion might not exist. Each case must be examined on its own facts to determine whether force or coercion is indeed present." (Emphasis added)

**In this case, there simply was no objective showing of force or coercion. Subjective rationalizations based on body language and unreasonable perceptions are insufficient, as a matter of law, to support the verdict. Nor was there any evidence of any threats to use force or violence on the complainant Boles where she believed that the Defendant has the present ability to execute the threats. The fact that the Defendant Cain held a knife in his hand earlier in the evening in**

**a conversation with Yvette Wright is legally insufficient. Likewise, the alleged hand gesture that the Defendant made in a conversation with Co-Defendant, Ramone Jones, is also legally insufficient. The crime of criminal sexual conduct - regardless of the degree - is not a strict liability crime. The Defendant, Derrick Cain, submits that there must be some proof and an applicable jury instruction requiring that the Defendant have knowledge that the sexual act was non-consensual. Since this is a crucial element, the failure to instruct on this element is reversible error.**

**In this case, it is very probable that the complainant --- based on her misperceptions and the actions of the Co-Defendant --- may have believed that the sexual acts were forced. However, her subjective beliefs are not enough. There is absolutely no evidence she told the Defendant no or to stop. (Vol. III, p. 80) Nor is there evidence that the Defendant physically forced the complainant. For instance, if a timid individual surrenders his money because another individual was rapidly approaching and the timid individual misperceived a robbery attempt --- this would not be a robbery.** The Defendant must intend to do the crime. **In this case, the jury was never asked to determine, through the Trial Court's instructions, that the Defendant, Derrick Cain, know that the complainant was not a consensual sexual partner.**

The requirement of mens rea or guilty knowledge has been incorporated into the common law. For instance People v. Davis, 101 Mich App 198, 300 NW2d 497, 500 (1980) in a case involving the commission of a rape within six (6') feet of a firearm, the Michigan Court of Appeals held that the Defendant must have knowledge of the guns nearby presence in order for the weapon element to be satisfied.

A case that makes the necessity of guilty knowledge perfectly clear, in a sexual misconduct case, is Missouri v. Gray, 497 SW2d (1973). In Gray, the prosecution's theory was that the complainant submitted to sexual intercourse because of threats from the

Defendant's brother. In their ruling, the Missouri Court of Appeals made clear that the Defendant must have knowledge that the alleged victim was submitting because of those threats:

> "We reach the conclusion that one may be guilty of rape if his victim submits through fear of physical violence, even if that fear is caused by one other than the defendant, if the defendant at the time has knowledge that his victim is submitting through such fear. Such a defendant in effect adopts, and uses for his own lascivious purpose, the fear engendered by another. Whether the fear is caused by the defendant or another, it is without the consent of the woman and amounts to 'forcibly ravishing' within the meaning of the rape statute. This brings us next to the question as to whether there was sufficient evidence so that a jury could find (1) that the prosecutrix submitted to defendant because of threats of Fats which caused her to fear physical violence to herself, and (2) that defendant had knowledge at that time that the prosecutrix was submitting because of threats of Fats."
>
> (Emphasis added) See also, People v. Langworthy, 416 Mich 630, 331 NW2d 171, 174 (1982)

A case that did address this question is People v. Brown, 197 Mich App 448, 495 NW2d 812, 813 (1992). While reiterating that only general intent was required, the Michigan Court of Appeals stressed that the Defendant would have had knowledge that the sexual act was non-consensual:

> "Defendant, after giving some money to the man who brought the victim into a house, had sex with her. He found her sitting in a bedroom, alone, naked, and crying. He disregarded her requests to go home and her statements that she did not want to be there and did not want to have intercourse. Defendant's assertion that he did not know that the victim had been kidnapped and raped by her

> kidnapper and by other men in the house is not sufficient to negate the fact that he forced himself upon her in a situation where her lack of consent and physical helplessness were clear."

Since knowledge is a legal requirement, the jury must be so instructed. In this case, there was no instruction that the Defendant knew that the complainant did not consent.

The Model Penal Code clearly recognized the need for the element of guilty knowledge in matters concerning sexual assault:

> "A person who subjects another not his spouse to any sexual contact is guilty of sexual assault, a misdemeanor, if:
>
> (1) He knows that the contact is offensive to the other person;"
>
> Model Penal Code Section 213.4
>
> (American Law Institute 1962) (Emphasis added)

The commentary to this section explains the requirement of knowledge of the offensiveness of the contact:

> "Section 207.6(1) (a) made sexual contact criminal if there was 'no consent.' This seems too strict a standard of criminality, considering the frequency with which tentative sexual advances are made without explicit assurance of consent."

In other words, consent may be implicitly given. There has not -- nor should there be -- a requirement that a consent agreement be signed prior to sexual contact. Based on the evidence in this case, it is quite probable that the Defendant was led to believe that the complainant consented.

The New Hampshire Supreme Court, while recognizing that rape is generally not a specific intent crime, indicated that the Defendant would still need to have knowingly committed the act. The Court held that "knowingly" rather than "purposely" was the appropriate mens rea for felonious sexual assault. New Hampshire v. Goodwin, 140 NH 672, 671 A2d 554 (1996). See also, People v. Smith, 185 Ill Dec 641, 614 NE2d 1326 (1993)(implicit requirement of knowledge of committing act); People v. Jeff, 251 Call Rptr 135, 204 CA3d 309 (1988)(even unreasonable fear in victim may suffice if accused knowingly takes advantage of that fear).

Essentially, it is the Defendant/Appellant's position that a conviction for CSC in the third degree requires that the Defendant have some knowledge or awareness of criminal wrong, specifically, that the sexual act was non-consensual. This knowledge has been variously described as mens rea, scienter or guilty knowledge. In a case of this nature, the complainant, if she is able, must effectively communicate her non-consent to the Defendant. Whether the communication is verbal or physical is immaterial. But the Defendant must be put on notice. Whether this is done, is for the jury to determine. See e.g., Bonker v. People, 37 Mich 4 (1877); People v. Griffen, 77 Mich 585, 43 NW 1061 (1899). Of course, the jury cannot make this determination in the absence of an instruction. Given the factual circumstances of this case, the necessity of a jury instruction on this issue is mandated. Once again, the Court of Appeals refused to deal with this issue. Therefore, a new trial with proper instructions is necessary.

Juries are not to be left to speculate upon the law. McKine v. Hammer, 387 Mich 82, 194 NW2d 841 (1972). The jury charge should declare to the jury what rules of law shall be applicable. Souvais v. Leavitt, 50 Mich 108, 15 NW 37 (1883). Reliance on such an amorphous word as "resistance" is insufficient to set any standards for the jury. The jury is left free to believe that the unexpressed subjective belief of the complainant governs the Defendant's actions. No one, including the Defendant Cain, can read

the complainant's mind. The Court of Appeals did not confront this issue as presented.

The Lower Court instructed the jury regarding the burden of proof as follows:

> "Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty."
>
> (Vol. V, p. 151; Emphasis added)
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> * * * * *
>
> "You may consider both direct and circumstantial evidence in determining whether the prosecution has met its burden of proving each element of the offense beyond a reasonable doubt."
>
> (Vol. V, p. 114; Emphasis added)

The Trial Court then proceeded to instruct as to the burden of proof as to the elements of the offense. However, the Court never instructed the jury that the prosecution bears the burden of disproving consent beyond a reasonable doubt. Of course, the Court provided no instructions on consent whatsoever.

Moreover, by reiterating that the prosecution bore the burden of proving the elements, the jury would naturally draw the conclusion that the Defendant would have the burden of proving consent - which was not offered as an element. Therefore, reversal is mandated on this ground.

Since consent is an absolute defense to a criminal sexual conduct charge, the jury must be instructed that the burden of proof is on the prosecution to disprove consent.

"The prosecution bears the burden of proving defendant's guilt beyond a reasonable doubt and, where defendant produces enough evidence to put an affirmative defense into controversy, the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt. Compare People v. Garbutt, 17 Mich 9 91868)(insanity); People v. Coughlin, 65 Mich 704, 32 NW 905 (1887)(self-defense), and People v. MacPherson, 323 Mich 438, 35 NW2d 376 (1949)(alibi). Shifting of the burden of proof in a criminal case goes to the very heart of the judicial process."

People v. Thompson, 117 Mich App 522, 324 NW2d 22, 24 (1982)(Emphasis added)

A new trial is warranted based on the improper standard given to the jury. See also, People v. Phifer, 66 Mich App 11, 238 NW2d 188 (1975)(concerning alibi defense)

**The Court erred in not limiting the unimpeached confession testimony of the Co-Defendant; RAMONE JONES to the Co-Defendant and, therefore, the Petitioner's Constitutional Right To confront witnesses was violated.**

**According to the complainant, Latasha Boles, the Co-Defendant, Ramone Jones, confessed to the crime and in fact apologized to her. (Vol. III, pp. 13-14)**

This testimony was totally unimpeached as the Co-Defendant, Ramone Jones, exercised his constitutional right to not testify. Not only was this testimony admitted without objection, there was no limiting instruction prohibiting use of this confession/apology against the Defendant, Derrick Cain.

There can be but no real dispute that the confession of a nontestifying defendant is inadmissible against a co-defendant. Bruton v. U.S., 391 US, 123, 88 S.Ct 1620, 20 L. Ed 2d 476, (1968) **People v. Watkins** 438 Mich 627, 475 NW2d 727 (1991), **People v Louzon,** 338 Mich 146, 61 NW2d 52 (1953), **People v Hepne**, 285 Mich 631, 281 NW 384 (1938). At the very least a limiting instruction was necessary. **People v Jackson,** 158 Mich App. 544, 405 NW 2d 192 (1987). Because there was no limiting instruction, the Prosecutor was allowed to use this confession against the Co-Defendants, according to all the testimony, were cousins and were in the home of the alleged offense together. There was also testimony that the Co-Defendants arrived together, left together and were together the next day.

The Trial Court denied the Defendants' Motion for Separate Trials. (Vol. II, p. 12) Counsel for Co-Defendant brought this Motion after jury selection. (Vol. II, p. 6) In his oral motion, counsel for Co-Defendant clearly indicated that he would attempt to cast blame on the Defendant, Derrick Cain. (Vol. II, p. 8)

The Co-Defendant's counsel made good on his threat. At trial, the complainant testified that Co-Defendant, Ramone Jones, in effect, admitted guilt by apologizing to her. Moreover, the Defendant, Derrick Cain, was portrayed as the violent one and as the Defendant who caused the complainant to complain to the police regarding the sexual encounter. (Vol. III, pp.147-151)

The record is replete with these references. Moreover, as demonstrated in other arguments, the chief plan of the Prosecutor was to make the Defendant Cain responsible for the alleged physical force used by Co-Defendant Jones. In closing argument, attorney Cooper was totally accusatory toward Derrick Cain: (pg. 119, 121, 125, 127) In effect, two (2) prosecutors tried the Defendant Cain. The Defendants were divided in theory and the Defendant Cain's motion for separate trials or a separate jury should have been granted. Under these extreme circumstances, (where the Trial Court

was warned of antagonistic positions - where there was an admission/confession by Defendant Jones - where the blame was thrown on Defendant Cain) Severance was necessary to allow the Defendant Cain to have a fair trial. People v Hurst, 396 Mich 1, 238 NW2d 6 (1976); U.S. v Cobleigh, 75 F. 3d 242 (6th Cir. 1996)

Prior to trial, Defendants' Counsel made a Motion requesting separate trials (Vol. II pg. 6) Counsel for Co-Defendant Ramone Jones candidly admitted that his trial strategy was to shift blame to Defendant Cain. (Vol. pg. 7-8; Vol. II pg. 8) The Court was clearly placed on notice as to the antagonistic position of the Defendants.

Most importantly, however, Mr. Cain was deprived of a fair trial by the introduction of the confession/admission of the non-testifying Co-Defendant. Consequently, Mr. Cain's Sixth Amendment right of confrontation was violated. Bruton v. U.S. 391 US, 123, 88 Sct 1620, 20 L. Ed 2d 476, (1968) held that where the confession of one codefendant contains references to a second codefendant, and the confessor refuses to take the stand, the use of that confession in a joint trial violates the second codefendant's Sixth Amendment right of confrontation; it is not sufficient simply to inform the jury that the confession constitutes admissible evidence only against the confessor. Here the purported confession/admission of Co-Defendant Ramon Jones inextricably linked the Defendant Derrick Cain to the crime as Derrick Cain testified he observed the sexual encounter between Ramon Jones and Latasha Boles. The Prosecuting attorney relied heavily on the use of the Co-Defendants statements in his closing argument. (Vol. V pg. 95) The Prosecuting attorney definitely attempted to link the alleged admission of the Co-Defendant Jones to the Defendant Cain. (Vol. V pg. 84)

The Michigan Court of Appeals misconstrued the Defendant/Appellant's Argument concerning the need for separate trials for the Defendant and Co-Defendant. The extensive Amended Brief on Appeal referred to and actually quoted testimony and argument of counsel that is prejudicial. The reference by the Court of

Appeals to three incited adverse arguments would be ludicrous if not so harmful. Defendant/Appellant was referring to the fact that the Prosecutor's two closing Arguments and the Co-Defendant's closing Argument were both directed against the Defendant/Appellant.

A strange anomaly exists in Criminal sexual Conduct Cases. There is an instruction (CJJ 2d 20.25) contained in the Michigan Criminal Jury Instructions (I.C.L.E.), which, unlike all other civil, criminal or probate cases places one witness above all others: the complainant in a Criminal Sexual Conduct Case. Based in this instruction, the jury was instructed as follows: "It is not necessary to prove any of the charges that there be evidence other than the testimony of the Complainant. (Vol. V pg. 15 and that's 3)

Since, it was only Derrick Cain and Latasha Boles who testified as eyewitnesses, the giving of this instruction gave her testimony undue deference. If the above instruction was given there should be a corresponding instruction that "(I)t is not necessary to prove any of these charges that there be evidence other than the testimony of the Defendant."

It has always been the rule that certain witnesses should not be given a preference over others. City of Lansing v. Hartsuff, 213 Mich.App 338, 539 NW2d 781 (1995); See also, People v. Logie 321 Mich. 303, 32 NW2d 458 (1948).

Moreover, the instructions published by the Institute For Continuing Legal Education have never been adapted by the Michigan Supreme Court and must always be carefully scrutinized People v. Petrella, 424 Mich. 221, 277 (1985); People v. Gordon, 99 Mich.App 142 (1980) and People v Moore, 176 Mich.App 555 (1989).

The original reason for the instruction was that there were some jurisdictions that gave instructions cautioning against believing

a rape complainant. This was never the case in Michigan. The pendulum must swing to the neutral position.

## RELIEF REQUESTED

Wherefore, Petitioner respectfully requests that this court grant certiorari to review the judgment of the Michigan Court of Appeals and hold that Petitioner is entitled to a new trial.

Respectfully submitted,

***FRANK G. BECKER & ASSOCIATES***

By: _____

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**Dated: December 20, 2000**

# APPENDIX TO PETITION FOR CERTIORARI

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STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

DERRICK D. CAIN,

Defendant-Appellant.

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UNPUBLISHED
August 13, 1999

No. 205970
Recorder's Court
LC No. 96-008833

Before: Neff, P.J., and Hood and Murphy, JJ.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(l)(b); MSA 28.788(4)(1)(b), and was sentenced to concurrent terms PER CURIUM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(l)(b); MSA 28.788(4)(1)(b), and was sentenced to concurrent terms of eight to fifteen years in prison. He appeals as of right, and we affirm.

We first address defendant's argument that there was insufficient evidence to prove that he accomplished the sexual acts by force or coercion as required by MCL 750.520d(l)(b); MSA 28.788(4)(1)(b). In reviewing the sufficiency of the evidence in a

criminal case, we are required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Jolly,* 442 Mich 458, 466; 502 NW2d 177 (1993).

A person is guilty of third-degree CSC if he engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. MCL 750.520d(l)(b); MSA 28.788(4)(1)(b). Force or coercion includes, but is not limited to, the following circumstances:

(1) When the actor overcomes the victim through the actual application of physical force or physical violence; (2) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats; or (3) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. MCL 750.520b(l)(f)(i)-(iii); MSA 28.788(2)(1)(f)(i)-(iii);

MCL 750.520d(l)(b); MSA 28.788(4)(1)(b). "The existence of force or coercion is to be determined in light of all the circumstances and is *not limited to acts of physical violence." People v Malkowski,* 198 Mich App 610, 613; 499 NW2d 450 (1993) (emphasis added). The term "force" includes the exertion of strength or power on another person, *People v Premo,* 213 Mich App 406, 409; 540 NW2d 715 (1995), and the term "coercion" includes circumstances that create a reasonable fear of dangerous consequences. *People v* McGill, 131 Mich App 465, 470-472; 346 NW2d 572 (1984).

The victim, seventeen years old at the time of the assaults, testified that she planned to spend the night at the home of a woman for whom she regularly baby-sat. The woman and her children were home when the victim arrived. Defendant and his cousin, codefendant Ramone Jones' came to the home later in the same evening. At one point during the evening, defendant checked that the side door was locked and Jones said "ain't nobody going nowhere". Sometime later, the victim observed defendant handling a knife in a strange manner. When defendant observed the victim trying to spurn Jones' advances, he told her to "give that man a play," which the victim understood to mean that she should respond to Jones' kisses. The victim again rejected Jones, telling him, in defendant's presence, to stop. The victim left the room and Jones followed. Later, after the victim went into the bedroom to sleep, Jones followed her and sexually assaulted her. Defendant observed his cousin having nonconsensual intercourse with the victim and apparently urged him on in his efforts. After Jones finished his assault, defendant remarked, in Jones' presence, that he "wasn't as nice!' as Jones, whereupon he commanded the victim to undress and get down on her knees. He told her that she "better" perform fellatio on him. The victim testified that she complied because she felt intimidated by the two older men and was scared. There was also testimony that, at some point when the victim, defendant and codefendant were in the bedroom, defendant whispered to codefendant and made a motion across his neck with a finger, which the victim interpreted as a "slitting throat" gesture. We find that this evidence, when viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the victim submitted to defendant out of a reasonable fear of dangerous consequences and thus, that defendant used coercion to accomplish the first act of fellatio.

The victim also testified that defendant sexually assaulted her a second time, after the woman for whom she baby-sat had left the house and she was alone with defendant and Jones. Defendant told

her that she would have to engage in oral sex with him again if she wanted to be allowed to leave. He then pulled her down to her knees and put his penis into her mouth. The victim's testimony evidences that defendant exerted physical strength or power on the victim. Such evidence, if believed, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant used force or coercion to accomplish the second act of fellatio.

We next address defendant's arguments with regard to the defense of consent. Defendant argues that his only theory of defense was that the sexual activity between the victim and himself was consensual. He claims that a new trial is warranted because his consent theory was not presented to the jury and no jury instruction on consent was given. Defendant cites to *People v Hearn,* 100 Mich App 749; 300 NW2d 396, 397-398 (1980) for the proposition that, even where no jury instruction was requested, a consent theory and instruction must be presented to the jury. We disagree.

In *People v Paquette,* 114 Mich App 773; 319 NW2d 390 (1982), aff'd 421 Mich 338 (1984), the defendant argued that the trial court erred by failing to instruct the jury on the defense of consent. As in this case, no request for such an instruction was made. The defendant relied on *Hearn, supra* to support his argument that the consent instruction was necessary and failure to give such an instruction was error requiring reversal. This Court disagreed because *Hearn, supra* did not involve the element of force or coercion:

> Hearn was charged with having committed first-degree criminal sexual conduct by engaging in sexual penetration with another person while armed with a weapon . . . . Hearn had testified that he had engaged in sexual penetration with the complainant with her consent and that he had been armed with a pocket knife

which, however, he did not display. Without instruction on the defense of consent, the jury might have believed Hearn's story but nevertheless convicted him.

**In contrast, here defendant was charged with having committed first degree criminal sexual conduct by engaging in sexual penetration with another person while aided and abetted by another person and while using force or coercion to accomplish the penetration, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). The trial judge instructed the jury:**

**"A person is guilty of criminal sexual conduct in the first degree, if he engages in sexual penetration with another person, and the actor is aided or abetted by one or more other persons, and the following circumstances exist. The actor uses force or coercion to accomplish the sexual penetration.**

"Force or coercion includes when the actor overcomes the victim through the actual application of physical force, or physical violence, and when the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor as the present ability to execute these threats.

"The term force or coercion means ....'

* * *

A jury following such instructions could not have convicted defendant if it believed that the

complainant consented to the sexual penetration. [Id at 780-781.]

Thus, this Court has concluded that an instruction on consent is not necessary where the element of force or coercion must be found in order to convict defendant. Similarly, in *People v Jansson,* 116 Mich App 674, 682-683; 323 NW2d 508 (1982), this Court stated:

> Although consent ... precludes conviction of criminal sexual conduct in the third degree by force or coercion, **the prosecution is not required to prove** nonconsent as an independent element of the offense. If the prosecution offers evidence to establish that an act of sexual penetration was accomplished by force or coercion, that evidence necessarily tends to establish that the act was nonconsensual....
>
> * * *
>
> [I]f the actor *coerces the victim to submit by* threats of present or future harm, it necessarily follows that the victim engaged in the act nonconsensually. In short, to prove force or coercion as those terms are defined in the statute is to establish that the victim did not consent. [Emphasis in original.]

See also *People v Johnson,* 128 Mich App 618, 623; 341 NW2d 160 (1983) ('The court's instruction requiring the jury to find that penetration was accomplished by force or coercion implicitly required the jury to find that the complainant did not consent to sexual intercourse before it could find defendant guilty."); and *People v Hale,* 142 Mich App 451, 453-454; 370 NW2d 382 (1985) (A trial court's instructions taken directly from the standard jury instructions on the necessary elements of third-degree criminal sexual conduct,

implicitly require the jury to find that the victim did not consent to sexual intercourse before the jury may convict.)

We find that there was no error requiring reversal in this case, which involved force or coercion, because the trial court did not need to instruct the jury on the defense of consent[1]. Similarly, we hold that it was not error for the trial court to fail to instruct the jury that the prosecutor needed to disprove consent. *Jansson, supra.*

Defendant next argues that the jury should have been required to find that he knew the sexual act was nonconsensual in order to convict. In other words, defendant contends that there was no evidence to support that he knew or should have known that the victim was not a willing participant and thus, his conviction cannot be sustained. This argument is disingenuous.

In *Jansson, supra* at 681, the defendant, like defendant herein, argued that he "did not know that the sexual relations were nonconsensual and, therefore, could not have intended to engage in those relations by force or coercion." The defendant also argued that without a manifestation of the victim's unwillingness to engage in sexual relations, he could not have known that she was not consenting. This Court rejected that argument:

> Defense counsel ... would require that there be proved a specific intent to overcome the will of the victim and, as a necessary precondition, knowledge on the part of the actor that the victim was not engaging in the act consensually. In short, defense counsel would have us require some manifestation of nonconsent by the victim. In our judgment, this is simply a suggestion that we require proof that the victim resisted the actor or at least expressed an intent to resist. The express language of the statute precludes any such

requirement, MCL 750,520(i); MSA 28.788(9). [Id at 683.]

See also *People v Brown*, 197 Mich App 448, 449450; 495 NW2d 812 (1992) (The crime is one of general intent and no knowledge is required for the element of force or coercion 2); and *Hale*, supra at 453 ("No Michigan case law requires the trial court to define consent in terms of a defendant's reasonable and honest belief that the victim consented.) Similarly, in this case, we reject defendant's argument that the jury should have been required to determine that defendant knew the sexual act was nonconsensual[3].

Defendant next argues that two jury instructions constitute error requiring reversal. We disagree. We review jury instructions in their entirety to determine if there was error that requires reversal, *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Because harmless error analysis applies, a new trial will not be granted based on error in jury instructions unless an examination of the entire record indicates that the error caused a miscarriage of justice. *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998). There is no error as long as the jury instructions "fairly presented the issues to be tried and sufficiently protected a defendant's rights." *Whitney, supra* at 252-253.

The complained of instructions were as follows:

> It is not necessary to prove any of these charges that there be evidence other than the testimony of the complainant. That is, if that testimony proves guilt beyond a reasonable doubt. Also to prove these charges the prosecutor does not have to show that the complainant resisted the defendants.

Defendant did not object to the jury instructions at trial and thus, this error is waived absent manifest injustice. *People v Torres,* 222 Mich App 411, 423; 564 NW2d 149 (1997). In this case, we find no manifest injustice.

The aforementioned instructions were given pursuant to standard jury instructions CJI2d 20.25 and 012d 20.26, which mimic statutory language. CJ2d 20.25 is based on MCL 750.520h; MSA 28.788(8), which states that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g." CJ12d 20.26 follows MCL 750.520i; MSA 28.788(9), which states that "[a] victim need not resist the actor in prosecution under sections 520b to 520g." Defendant here was prosecuted under § 520e; The instructions were in accordance with the statutes and were proper. Thus, there was no error.

Defendant next argues that the verdict was against the great weight of the evidence and the trial court, sitting as the thirteenth juror, should have granted a new trial because of the weight of the evidence in favor of defendant. We disagree. We review the trial court's decision for an abuse of discretion. *People v Gadomski,* 232 Mich App 24, 27; 592 NW2d 75 (1998).

The thirteenth juror standard set out in *People v Hebert, 444 Nfich* 466; 511 NW2d 654 (1993), the case cited to by defendant, has been rejected. *People v Lemmon,* 456 Mich 625, 627; 576 NW2d 129 (1999). Recently, in Gadomski, supra at 28, this Court looked at the Supreme Court's ruling in *Lemmon* and stated:

> The Michigan Supreme Court has subsequently rejected the "thirteenth juror" standard and explained that a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it

> would be a miscarriage of justice to allow the verdict to stand. However, neither the former nor the current understanding of the law with respect to such motions [new trial motions based on the great weight of the evidence] provides that this Court may make a credibility determination on appeal. To the contrary, it is
>
> well settled that this Court may not attempt to resolve credibility questions anew. [Citations omitted.]

We find no abuse of discretion in the trial court's failure to grant a new trial based on the great weight of the evidence in this case. Defendant's argument on appeal rests on his claim that the victim's testimony was not credible, which argument we may not decide, and on his claim that there was insufficient evidence, an argument we explicitly reject.

Defendant also makes a strained argument that testimony about codefendant's willingness to take a polygraph examination tainted the case because there was no similar evidence that he too was willing to take a polygraph examination. Defendant argues that the jury was left with an inference that he was "not willing to test his credibility through this procedure" and that this inference was so prejudicial, reversal is required. We disagree.

Defendant failed to object to the testimony regarding codefendant's willingness to take a polygraph examination. Our review is therefore "precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Mayfield, 221* Mich *App 656, 661; 562* NW2d 272 (1997). We find no miscarriage of justice.

It is well established that evidence that a polygraph examination was conducted and the results of such examination is inadmissible at trial. The reason for exclusion is the lack of trustworthiness of the accuracy of a polygraph examination. *[People v Triplett,* 163 Mich App 339, 343; 413 NW2d *791 (1987),* remanded on other grounds 432 Mich 568 (1989).]

In this case, there was no testimony that defendant, or codefendant, took and failed a polygraph examination. Thus, the reason for excluding evidence of a polygraph, lack of accuracy of the result, is not applicable to the situation. Moreover, the references to a polygraph were fleeting and only directed to codefendant. The testimony was admitted by codefendant's counsel in an apparent attempt to bolster codefendant's credibility with the suggestion that he would've taken a polygraph but was never given one.

On appeal, defendant also argues that defendant and codefendant were inextricably linked with regard to their involvement in the case and thus, reference to codefendant as "Psycho" caused reversible prejudice to defendant. Defendant's argument rests on the fact that if the jury perceived codefendant to be a psycho, they would necessarily consider defendant in the same vein and this amounts to reversible prejudice. We disagree that there was any error requiring reversal.

At the beginning of trial, codefendant's counsel expressed concern that he did not wish codefendant to be referred to by his alleged nickname of "Psycho". The judge cautioned the prosecution to instruct its witnesses to refer to codefendant as "Mr. Jones", but also indicated that if the term "Psycho" came out in the development of the story, it would be appropriate for the victim to use it. During trial, the victim testified that she was introduced to codefendant Jones as "Psycho". She thereafter did not refer to codefendant 'as "Psycho" with the exception of one instance where she referred to him by the nickname but then immediately corrected herself and

said, "I mean Ramone". Defendant did not object and did not request a curative instruction. Thus, we review only for a miscarriage of justice, *Mayfield, supra,* and find none. Defendant's argument that these two fleeting references caused reversible prejudice because they could have led the jury to surmise that defendant also possessed psychotic characteristics is speculative at best.

Defendant next argues that the trial court should have granted defendant and codefendant separate trials and that failure to do so interfered with his right to a fair trial. He argues that codefendant portrayed defendant as being "the violent one" during the events and that the defendants were divided in theory. We review for an abuse of discretion. *People v Hana,* 447 Mich 325, 33 1; 524 NW2d 682, amended 447 Mich 1203 (1994).

> Severance is mandated only when a defendant demonstrates that his substantial fights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. Severance is required where the defenses are mutually exclusive or irreconcilable, not simply where they are inconsistent. *[People v McCray, 210* Mich App 9, 12; 533 NW2d 359 (1995), citing *Hana, supra* at 345.]

In this case, prior to trial, codefendant's counsel indicated that his defense may be antagonistic to defendant. Codefendant was going to argue that the victim's sexual activity with codefendant was entirely consensual and that only when codefendant did not protest defendant's requests for fellatio from the victim, did she became upset and go to the police. Neither defendant or codefendant offered a supporting affidavit or made an offer of proof that "clearly, affirmatively, and fully demonstrate[d] that" their substantial fights would be prejudiced if severance was not granted. *Hana, supra* at 346.

On appeal, we find that the trial court did not abuse its discretion in failing to grant defendant and codefendant separate trials. The defenses, as actually presented, were barely antagonistic and, in fact, meshed quite well. Codefendant's defense did not negate or interfere with defendant's defense of lack of force or coercion in any manner. The defenses were certainly not mutually exclusive or irreconcilable, and thus, the requisite prejudice did not occur at trial and reversal is not warranted. *Hana, supra.* See also *People v Cadle (On Remand),* 209 Mich App 467; 531 NW2d 761 (1995) ("[D]efenses must be not only inconsistent, but also mutually exclusive or irreconcilable.)

Defendant next argues that the trial court demonstrated excessive impartiality toward the victim and should have excluded her from the courtroom during trial. We disagree. A party who challenges "on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v MI Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996). In this case, defendant has failed to overcome the presumption. The incidents, which defendant claims demonstrate the trial court's impartiality, evidence nothing more than the trial court's respectful posture to both the victim and the parties. Codefendant's counsel complained to the court, at one point during trial, that the victim was making gestures to communicate with a witness on the witness stand. The trial court indicated that it had not noticed the victim engaging in that conduct, but stated that it would take an objection to that conduct under advisement. Later, codefendant's counsel again indicated that he believed the victim was inappropriately by shaking her head in response to testimony. The trial court acknowledged that the attorney had brought it to his attention. He then asked defendant's attorney to continue his cross-examination, which was in progress. When codefendant's attorney protested the lack of warning to the victim, the trial court instructed the victim to not make any signals. While he tempered this comment4, apparently because he had not witnessed the conduct, there is no indication that he tempered the comment because he was partial to the victim or was attempting to bolster the victim's

credibility. Thus, we find no error requiring reversal. We also note that defendant's speculation that by allowing the victim to remain in the courtroom, she "was potentially able to influence testimony and to non-verbally communicate with the jury" does not support reversal. There is no indication whatsoever that the victim influenced testimony or improperly communicated with the jury.

Defendant next argues that hearsay testimony was elicited from a witness and that the testimony improperly reiterated and reinforced the victim's credibility. The testimony at issue was admitted without a contemporaneous objection from either defendant. However, after the testimony was given and a lunch break taken, both defendant's counsel and codefendant's counsel indicated to the court that they were concerned that the prosecutor was eliciting hearsay. Defendant's counsel stated that he did not have any trouble with the prosecution asking questions that fell within hearsay exceptions, i.e. state of mind, but was concerned that other testimony was "rank hearsay". He then specifically indicated that he did not want a curative instruction at that point. The trial court reminded counsel that they needed to object contemporaneously and he would rule appropriately.

Defendant now claims that the testimony, given without objection, requires reversal because not all of it qualified under an exception to the hearsay rule. This issue is not preserved. *People v Jones,* 203 Mich App 384, 390; 513 NW2d 175 (1994). Moreover, we note that even if the issue could be deemed preserved by the late objection, we find no error requiring reversal. The erroneous admission of hearsay evidence is subject to harmless error analysis. *People v Bartlett,* 231 Mich App 139, 158-159; 585 NW2d 341 (1998). Reversal based on preserved, nonconstitutional error is warranted only if "'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity,* ____ Mich ____NW2d

____(1999). Defendant has failed to demonstrate that the alleged error was more probably than not outcome determinative.

Defendant next argues that his right to effective assistance of counsel was violated because his theory of consent was not presented to the jury; because his counsel did not object to the hearsay testimony complained about above; because the only request for separate trials came on the day of trial; and because improper character evidence was admitted. Defendant failed to move *for* a new trial or evidentiary hearing on this issue and therefore, our review is limited to errors that are apparent from the trial court record. *People v Nantelle,* 215 Mich App 77, 87; 544 NW2d 667 (1996).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell,* 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell,* supra. In this case, defendant's brief argument completely fails to make the requisite demonstration that without the complained of errors, there was a reasonable probability that he would not have been convicted. Further, we find insufficient evidence on the record to support defendant's allegations that he was denied effective assistance of counsel.

Defendant next argues that the closing arguments given by the prosecution and the codefendant were prejudicial to him and that the prosecutor's arguments were unsupported. "[P]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn,* 98 Mich App 593 596; 296 NW2d 315

BEST AVAILA

(1980). "They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Bahoda,* supra, quoting *People v Gonzalez,* 178 Mch App 526, 535; 444 NW2d 228 (1989). Our review of the record does not reveal that the prosecutor's argument was improper or unsupported. The prosecutor property argued the evidence and reasonable inferences from that evidence.

Defendant also argues that codefendant, during his closing argument, created three arguments adverse to defendant and that because codefendant's argument followed defendant's closing argument, he could not defend against the accusations. First, defendant fails to elaborate on what these "three (3) adverse arguments" are and does not cite to the record to demonstrate their existence. Second, this argument is unsupported by any legal authority and thus, no relief is required. *Magee v Magee,* 218 Mch App 158, 161; 553 NW2d 363 (1996). Third, and more importantly, our thorough review of the record fails to reveal any arguments made by codefendant's counsel that were prejudicial to the extent that defendant was denied a fair trial.

Defendant next argues that his Fifth Amendment rights were violated by testimony that revealed that he failed to turn himself over to police after he was informed of the warrant for his arrest. We disagree[5]. Because defendant did not object to the testimony at trial, the issue is not preserved. *People v Miller,* 211 Mich App 30, 42; 535 NW2d 518 (1995). However, we may review it because it raises a constitutional issue, which if valid could be outcome determinative. *Id*

In this case, defendant made a voluntary statement to the police and was released. Later, he learned that there was a warrant for his arrest. He talked to an officer about the warrant, but faced to turn himself in to the police department. Testimony about his failure

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to turn himself in to the police department did not violate his Fifth Amendment right against self-incrimination.

> The Fifth Amendment and Const 2963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial, The Fifth Amendment privilege has been extended beyond criminal trial proceedings "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." [*People v Schollaert,* 194 Mich App 158, 64; 486 NW2d 312 (1992) (citation omitted).]

In determining whether the Fifth Amendment is implicated, the "relevant inquiry is whether [the defendant] was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way." Id at 165 (citations omitted). Under the facts of this case, defendant was not arrested at the time he learned of the warrant and he was not under any compulsion to be a witness against himself. His conduct in failing to submit to the warrant for his arrest does not implicate any Fifth Amendment rights and thus, there is no error requiring reversal.

Defendant next argues that he should be resentenced because his juvenile conviction was given too much weight by the trial court. Defendant has waived any review related to his sentence because he has failed to submit a copy of the presentence investigation report as required by MCR 7.212(C)(7). MCR 7.212(C)(7) states that "[I]f an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presentence report to the court at the time the brief is filed." We also note, however, that the trial court properly considered defendant's juvenile convictions when imposing his sentence, *People v Smith,* 437 Mich 293; 470 NW2d *70* (1991); *People v Jones, 173* Mich App 341, 343; 433 NW2d 829 (1988), and our review of the record does not reveal

that the trial court placed too much emphasis on defendant's juvenile record.

Defendant also argues that the cumulative effect of the errors in this case mandates reversal. Only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra* at 292 n 64. Where no errors are found, there can be no cumulative error. See *People v Maleski,* 220 Mich App 518, 525; 560 NW2d 71 (1996).

We also note that defendant attempts to advance several other arguments on appeal. We find that these arguments are, however, abandoned.

First, defendant complains about the admission of testimony that codefendant apologized to the victim. In his argument, defendant cites to the testimony from the trial wherein the victim claimed that codefendant apologized to her, stating that he was wrong for "doing what he did". Other than citing to this testimony, defendant simply states:

> This testimony was totally unimpeached and uncontradicted as the Co-Defendant, Ramone Jones, exercised his constitutional right to not testify. Not only was this testimony admitted without objection, there was no limiting instruction prohibiting use of this confession/apology against the Defendant, Derrick Cain.

Defendant provides no other argument to the court on this issue. Because defendant did not object to the testimony below and because he has failed to provide any argument or legal authority to support his position that the testimony was improperly admitted, we deem this issue abandoned. *People v Rollins,* 207 Mich App 465, 468; 525 NW2d 484 (1994)[6].

Second, defendant also claims that impermissible character evidence was admitted through the victim's testimony. He does not provide any argument or legal authority to support that the complained of testimony, to which there was no objection, constitutes error. Thus, this issue is also deemed abandoned. *Rollins, supra.*

Finally, defendant argues that the trial court erred because it did not instruct the jury on any lesser included offenses. Defendant failed to request any lesser included instructions at trial and, more importantly, on appeal he completely fails to set forth what instructions he believes should have been given. We will not speculate as to what lesser included instructions may have been appropriate in this case, if any. Moreover, we will not search for authority to support that there were lesser included instructions that could have been given and should have been given. *People v Lynn,* 223 Mich App 364, 368-369; 566 NW2d 45 (1997).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1]In making our ruling, we note that defendant also cites to *People v Thompson,* 117 Mich App 522; 324 NW2d 22 (1983) to support that a consent instruction should have been given. *Thompson,* like *Hearn, supra,* did not require a finding of force or coercion to convict the defendant. The theory against the defendant in *Thompson* was that the criminal sexual penetration occurred under circumstances involving the commission of a felony. *Id* at 526-527.

[2] Defendant's citation to *Brown* for the proposition that our Court has stressed that a defendant needs to have knowledge that the sexual act was nonconsensual is a misrepresentation of the ruling and language in that case.

[3] We note that, although not pertinent to a resolution of the issue, defendant's argument that he had no knowledge that the victim was not consenting is completely unsupported by the record. There was testimony that the victim told codefendant Jones that she did not want to engage in sexual activity with him and was crying while he assaulted her. Defendant testified that he watched codefendant Jones engaging in sexual activity with the victim. The victim testified that defendant entered the room while Jones was assaulting her. Thus, there was ample evidence from which to infer that defendant was aware that the victim was not a willing participant when defendant required the victim to submit to perform fellatio on him immediately after Jones' forced assault.

[4] The trial court stated:

> [Victim], and I'm not saying that you're doing anything wrong, but don't try to make any signals, and I'm not suggesting that you are, but don't do anything like that. I don't think that you would, all right. Continue.

[5] Initially, we note that the only authority cited by defendant in support of his argument is *People v Hurd*, 102 Mich App 424; 301 NW2d 881 (1980), which was vacated by the United States Supreme Court, 454 US 807; 102 S Ct 81; 70 L Ed 2d 77 (1981). It has no precedential value.

[6] Defendant also claims that his sixth amendment right of confrontation was violated. He cites to *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968) for the proposition

that "where the confession of one defendant contains references to a second codefendant, and the confessor refuses to take the stand, the use of that confession in a joint trial violates the second codefendant's Sixth Amendment right of confrontation." *Bruton* has no bearing on the case at hand. Codefendant's apology to the victim never referenced or implicated defendant in any manner. The victim testified that codefendant apologized for the wrong *he* did. This is not a case where codefendant confessed in a manner that implicated the defendant in any wrongdoing.

[7] The prosecution asked the victim, "Why didn't you care for him [defendant] too much? Is it something that you had seen?" The victim answered, "Yes." The prosecution followed up by asking "What's that?", at which point defendant's counsel objected on the grounds that the prosecution was asking leading questions. The court instructed the prosecution not to lead the witnesses and the examination continued with the prosecutor eliciting information about a prior incident between defendant and the victim. Defendant's counsel did not object to this testimony at all.

**Order**

**Michigan Supreme Court**
**Lansing, Michigan**

**Entered:** August 22, 2000

Elizabeth A. Weaver,
Chief Justice

115865

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 115865
COA: 205970
Rec Ct: 96-008833

DERRICK CAIN,

Defendant-Appellant.

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On order of the Court, the application for leave to appeal from the August 13, 1999 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

G0815

**I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.**

**_____, 2000** **_____**

**Clerk**